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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

SAN DIEGO CITY EMPLOYEES' RETIREMENT
SYSTEM ("SDCERS") BUDGET

INTRODUCTION

The establishment and regulation of employee pensions in charter cities is considered a municipal affair within the meaning of the home rule provisions of the California Constitution. *Grimm v. City of San Diego*, 94 Cal.App.3d 33, 37 (1979). Generally speaking, this means that the charter cities are free to regulate in this area, subject only to the express limitations contained in their city charter and the California Constitution. *City of Green Valley v. Walkinshaw*, 34 Cal.2d 595 (1949). Any constitutional limitation on this power must be an express limitation. A law which purports to divest a charter city of power in an area traditionally considered a municipal affair is strictly interpreted in favor of municipal power and against the existence of any limitation not expressly stated. *Id.* at 599. Therefore, although Section 17 of Article XVI of the California Constitution grants plenary authority to the City Employees' Retirement Board ("SDCERS Board") to "administer" the pension system, that authority is limited to those matters specifically identified within the section. *Westly v. Board of Administration, et al.*, 105 Cal.App.4th 1095, 1113 (2003).

**THE CITY OF SAN DIEGO IS ENTITLED TO EXAMINE THE CITY
EMPLOYEES' RETIREMENT BOARDS' ("SDCERS BOARD")
ADMINISTRATION AND FINANCES**

A pension board's power is limited to those areas which are specifically assigned to it by the relevant legislature. *Id.* at 106-1107. A city may subject a pension board to imposition of standards that constrain the discretion of the board or person, subject only to what limitations are established by municipal or state codes, or the California Constitution. *City of Green Valley*, supra. As will be set forth below, the City Charter provides the City Manager and the City Auditor and Comptroller with authority to examine and audit the SDCERS Board's operations, which authority is not constrained by Article XVI, Section 17 of the California Constitution.

A. The City Manager and/or City Auditor and Comptroller are empowered under the City Charter to examine and audit the affairs of the SDCERS Board.

The San Diego Municipal Code bestows upon the City Manager the power to investigate and/or examine the affairs and operations of *any* City board upon resolution of the Council. San Diego Municipal Code (“SDMC”) Chapter II, Article 2, §22.0205. Since SDCERS Board is a “city board” within the meaning of the Charter and the municipal code, it is subject to this investigative power. SDMC Chapter II, Article 2, section 22.1801(b).

Even greater power is granted under the Code to the City Auditor and Comptroller. Section 22.0701 bestows upon the City Auditor and Comptroller the right to examine and audit the SDCERS Board accounts and records. SDMC Chapter II, Article 2, section 22.0701. This section allows the City Auditor and Comptroller to conduct an investigation and/or audit *at any time*, not conditional upon a specific City Council resolution authorizing same. In fact, not only is the City Auditor and Comptroller entitled to review such records, he is *required* to do so under Chapter 1, Article VII, section 82. This section requires the City Comptroller and Auditor must examine any claim for payment and to insure that the claim is in proper form, correctly computed, and duly approved; *that it is legally due and payable*; that an appropriation has been made therefore which has not been exhausted; and that there is money in the treasury to make payment before issuing payment.

Further, should the Board refuse access to such records, the City Manager and City Clerk may compel such access. SDMC Chapter 1, Article 2, section 12.0102. This section provides the City manager, the City Clerk, or any of their designated Enforcement Officials with the power to inspect public and private property for purposes of ensuring compliance with municipal and applicable state codes, and to use all available judicial and/or administrative remedies as may be available towards this end.

B. Article XVI, Section 17 of the California Constitution does not exempt the SDCERS Board from City review and audit of its administration and expenses

As noted above, a public pension board is granted “plenary authority” over the administration of the pensions system by California Constitution Art. XVI, section 17, “subject to” all of the subdivisions that follow. *Westly* at 1113. Authority is limited, however, to the matters specifically enumerated therein. As clearly stated by the Third District Court of Appeal in *Westly*: “We have concluded that the powers the voters intended to give the Board (in enacting Proposition 162) do **not** include the exclusive and unfettered authority over payments made to and on behalf of its members and employees”. Rather, the extent of the Board’s authority *is limited to the specific areas enumerated in the Section*. *Westly* at 1113, emphasis added. The determinative question as to whether the aforementioned Charter provisions are circumvented by Section 17 is whether these provisions are “contrary to” that section. *Westly* at 1113.

The *Westly* case involved an attempt by the state pension board to avoid limitations on the compensation of its members and employees imposed by state law. The court rejected this argument, finding 1) that the right to determine the compensation of state employees was specifically granted by the Legislature to the state Controller; and 2) that the “plenary authority” granted the board under Section 17 did not immune the Board to regulation which did not conflict with its provisions.

Significantly, in reaching its decision, the *Westly* court noted that the State Controller, like our City Auditor and Comptroller, is entrusted by statute with the duty to ensure that the decisions of a subordinate agency that affect expenditures are within the fundamental jurisdiction of the agency. *Westly* at 1106. Therefore, the court rejected the Retirement Board’s attempt to determine its own rules relative to expenditure: “An attempt by an administrative agency to exercise control over matters which the legislature has not seen fit to delegate to it *is not authorized by law and in such cases the agency’s actions can have no force or effect*. *Westly* at 1106, emphasis added.

Significantly, the Court in *Westly* specifically considered and rejected the Board’s contention that the State’s regulation of its expenditures would make it impossible for the Board to comply with its fiduciary duties under Section 17. Since the State reserved for itself the right to dictate the employee classifications, salaries, and other compensation. The board had no right to dictate the reasonable limits of those expenses. *Westly* at 1114. Instead, the Board was obligated to carry out its duties under Section 17 within the confines of the law.

RECOMMENDATION

In our case, as in *Westly*, the SDCERS board has attempted to circumvent City law by refusing to allow the City access to its records. As set forth above, however, the power to investigate/examine/audit those records is reserved by the legislature to the City Manager and/or the Auditor and City Comptroller. No such power is vested in the Board by the Charter, nor is it extended under the Constitution. The “plenary authority” conveyed to the Board by Section 17 does not serve to forfeit the City’s power to review the Board’s activities. In fact, to eliminate municipal review of a pension board’s activities would contradict the very purpose of the Section, which is to assure that pension funds are administered in a manner which will assure prompt delivery of benefits, and related services to participants and beneficiaries and limit employer contributions. Therefore, it is recommended that the City Council direct the City Manager and the City Auditor and Comptroller to take action pursuant to the aforementioned sections to examine and audit SDCERS.

Respectfully submitted,

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The Honorable Mayor and City Council

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